Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd) & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01–428 OF 2010
ABU SAMAH NORDIN, AZHAR MA'AH AND ALIZATUL KHAIR JJCA
29 SEPTEMBER 2015

Administrative Law — Judicial review — Application for — Decision of Ketua Pengarah Hasil Dalam Negeri to treat payments for leased communication facilities as royalty and therefore subject to payment of withholding tax — Validity of decision making process — Whether appellant acted in excess of his powers under Income Tax Act — Whether appellant acted unreasonably and committed an error of law by invoking ss 109 and 109B of the Income Tax Act — Whether appellant had taken into consideration irrelevant matters

Revenue Law — Income tax — Withholding tax — Whether payments for leased communication facilities were royalty and therefore subject to payment of withholding tax — Whether first respondent liable to pay withholding tax on payments

The second respondent, a company operating from outside Malaysia, had entered into a service agreement with the first respondent by which the second respondent agreed to provide services to the latter to facilitate access to the global network for voice, data and video communication ('the leased communication facilities') so as to enable the first respondent to connect to the worldwide telecommunication network. Under the terms of the service agreement the first respondent had to make payments at a fixed rate for the services provided by the second respondent. Pursuant to an audit conducted at the first respondent's business premises the appellant discovered that the first respondent had not paid any withholding tax in respect of the payments it had made to the second respondent. The appellant treated the payments made by the first respondent to the second respondent for the leased communication facilities as royalty and therefore subject to payment of withholding tax under ss 109 and/or 109B of the Income Tax Act ('the Act'). Although the first respondent argued that its payments to the second respondent were not royalty and not subject to withholding tax as they were payments made to a non-resident for services wholly performed outside Malaysia, the appellant insisted that the first respondent was liable to pay withholding tax on the payments. The first respondent reluctantly paid the withholding tax. Subsequently the respondents challenged the decision of the appellant by way

of judicial review pursuant to O 53 of the Rules of the High Court 1980. By way of this application the respondents sought, inter alia, an order of certiorari to quash the decision of the appellant to treat the payments as royalty and therefore subject to withholding tax under ss 109 and/or 109B of the Act and a declaration that the appellant's decision was erroneous in law. The High Court found that in the circumstances of the case it was unreasonable of the appellant to apply both ss 109 and 109B of the Act and that applying both sections rendered the appellant's decision unreasonable. It was also the decision of the High Court that the appellant had erred in concluding that that the payments by the first respondent were royalties. As such the High Court allowed the respondents' application for judicial review. Hence the present appeal wherein the appellant submitted that he had in fact given the first respondent reasons as to why the payments were treated as royalty and subject to withholding tax. The appellant further submitted that the right to use the software as granted to the first respondent under the service agreement, fell within the definition of royalty under s 2 of the Act and was thus subject to withholding tax. The respondents maintained that it was wrong for the appellant to treat the payments as royalty and subject to withholding tax when such payments were paid to a non-resident for services performed outside Malaysia.

Held, dismissing the appeal with costs:

(1) There is a clear distinction between judicial review and appeal. Appeal is concerned with the merits of the case, in the sense that the appellate court could substitute its own opinion for that of the decision maker, while a review by contrast is not concerned with the merits of the decision but with the validity of the decision-making process. In the present case, it was clear that the appellant had acted unreasonably by invoking both ss 109 and 109B of the Act in deciding whether the payments by the first respondent for the leased communication facilities were royalty within the meaning of s 2 of the Act. By at first contending that the said payments were in fact and in law royalty and chargeable as withholding tax under s 109 of the Act, the appellant had in fact impliedly admitted that the said payments were not chargeable under s 109B of the Act. However, in a later letter the appellant relied on both ss 109 and 109B of the Act. Both ss 109 and 109B of the Act were distinctly different and each section dealt with different subject matter. Consequently, the appellant had not only acted unreasonably but had committed an error of law and exceeded his statutory power by relying on both sections of the Act (see paras 21 & 24–26).

(2) It is settled law that any doubt as to the applicable provision of the taxing statute must be held in favour of the taxpayer (see paras 27–29).

(3) Further the appellant had taken into consideration irrelevant matters by relying on the unsigned draft agreement, the customer services contract, in arriving at his decision. A decision of an inferior tribunal, which took into consideration irrelevant matters or disregarded relevant matters, was amenable to judicial review and liable to be set aside (see para 30).

[Bahasa Malaysia summary

Responden kedua, sebuah syarikat yang beroperasi di luar Malaysia, telah memasuki perjanjian perkhidmatan dengan responden pertama di mana responden kedua bersetuju untuk menyediakan perkhidmatan kepada responden pertama untuk memudahkan akses kepada rangkaian global untuk suara, data dan komunikasi video ('kemudahan komunikasi yang dipajak') bagi membolehkan responden pertama untuk menyambung kepada rangkaian telekomunikasi di seluruh dunia. Di bawah terma perjanjian perkhidmatan responden pertama mesti membuat bayaran pada kadar tetap untuk perkhidmatan yang disediakan oleh responden kedua. Menurut audit dijalankan di premis perniagaan responden pertama perayu mendapati bahawa responden pertama tidak membayar apa-apa cukai pegangan bagi bayaran yang telah dibuat kepada responden kedua. Perayu menganggap bayaran yang dibuat oleh responden pertama kepada responden kedua untuk kemudahan komunikasi dipajak sebagai royalti dan oleh itu tertakluk kepada pembayaran cukai pegangan di bawah ss 109 dan/atau 109B Akta Cukai Pendapatan ('Akta'). Walaupun responden pertama berhujah bahawa bayaran kepada responden kedua bukan royalti dan tidak tertakluk kepada cukai pegangan kerana ia bayaran yang dibuat kepada bukan pemastautin untuk perkhidmatan yang dilaksanakan sepenuhnya di luar Malaysia, perayu menegaskan bahawa responden pertama diwajibkan untuk membayar pegangan cukai ke atas bayaran. Responden pertama secara tidak rela membayar cukai pegangan. Selepas itu responden mencabar keputusan perayu melalui semakan kehakiman menurut A 53 Kaedah-Kaedah Mahkamah Tinggi 1980. Melalui permohonan ini responden memohon, antara lain, satu perintah certiorari bagi membatalkan keputusan perayu untuk menganggap bayaran sebagai royalti dan oleh itu tertakluk kepada cukai pegangan di bawah ss 109 dan/atau 109B Akta dan deklarasi bahawa keputusan perayu adalah salah di sisi undang-undang. Mahkamah Tinggi mendapati bahawa dalam keadaan kes itu ia adalah tidak munasabah bagi perayu untuk memohon kedua-dua ss 109 dan 109B Akta dan menggunakan kedua-dua seksyen menyebabkan keputusan perayu tidak munasabah. Ia juga adalah keputusan Mahkamah Tinggi bahawa perayu telah terkhilaf dalam menyimpulkan bahawa bayaran oleh responden pertama adalah royalti. Oleh itu Mahkamah Tinggi membenarkan permohonan responden untuk mengkaji semula semakan kehakiman. Oleh itu rayuan ini di mana perayu berhujah bahawa dia sebenarnya telah memberikan sebab kepada responden pertama mengapa bayaran dianggap sebagai royalti dan tertakluk kepada cukai pegangan. Perayu berhujah bahawa hak untuk menggunakan perisian seperti yang diberikan kepada responden pertama di

bawah perjanjian itu, jatuh dalam definisi royalti di bawah s 2 Akta dan dengan itu tertakluk kepada cukai pegangan. Responden menegaskan bahawa ia adalah salah bagi perayu untuk menganggap bayaran sebagai royalti dan tertakluk kepada cukai pegangan apabila bayaran itu telah dibayar kepada bukan pemastautin untuk perkhidmatan yang dilaksanakan di luar Malaysia.

Diputuskan, menolak rayuan dengan kos:

(1) Terdapat perbezaan jelas antara semakan kehakiman dan rayuan. Rayuan berkaitan dengan merit kes, dalam erti kata bahawa mahkamah rayuan boleh menggantikan pendapat sendiri untuk pembuat keputusan itu, manakala semakan kehakiman sebaliknya tidak mengambil kira dengan merit keputusan tetapi dengan kesahihan proses membuat keputusan. Dalam kes ini, ia adalah jelas bahawa perayu telah bertindak dengan tidak munasabah dengan memohon kedua-dua ss 109 dan 109B Akta dalam menentukan sama ada bayaran oleh responden pertama untuk kemudahan komunikasi dipajak adalah royalti mengikut pengertian s 2 Akta. Dengan berhujah bahawa bayaran itu sebenarnya dan royalti undang-undang dan boleh dikenakan cukai sebagai cukai pegangan di bawah s 109 Akta tersebut, perayu telah sebenarnya tersirat mengakui bahawa bayaran itu tidak boleh dikenakan cukai di bawah s 109B Akta. Walau bagaimanapun, dalam surat kemudian perayu bergantung kepada kedua-dua ss 109 dan 109B Akta. Kedua-dua ss 109 dan 109B Akta adalah jelas berbeza dan setiap bahagian diperlakukan perkara yang berbeza. Oleh itu, perayu tidak hanya bertindak dengan tidak munasabah tetapi telah melakukan kesilapan undang-undang dan melebihi kuasa bersumpahnya dengan bergantung kepada kedua-dua bahagian Akta (lihat perenggan 21 & 24–26).

(2) Ia adalah undang-undang jelas bahawa apa-apa keraguan berkaitan dengan proviso terpakai statut cukai hendaklah diputuskan pada pihak pembayar cukai (lihat perenggan 27–29).

(3) Seterusnya perayu telah mengambil dalam pertimbangan perkara yang tidak berkaitan dengan bergantung kepada draf perjanjian yang tidak ditandatangani, kontrak perkhidmatan pelanggan, dalam membuat keputusannya. Satu keputusan tribunal rendah, yang mengambil dalam pertimbangan perkara yang tidak berkaitan atau tidak mengambil kira perkara berkaitan, telah bersetuju dengan semakan kehakiman dan boleh dikenakan diketepikan (lihat perenggan 30).]

Notes

For cases on application for judicial review, see 1(1) *Mallal's Digest* (5th Ed, 2015) paras 312–381.

For cases on withholding tax, see 10(2) *Mallal's Digest* (5th Ed, 2015) paras 2917–2920.

Cases referred to

Bharat Sanchar Nigam Ltd & Anr v Union of India & Ors (2006) 3 SCC 1, SC (distd)

Chief Constable of the North Wales Police v Evans [1982] 3 All ER 141, HL (refd)

Commissioner of Income-Tax v Davy Ashmore India Ltd (1991) 190 ITR 626 Cal, HC (refd)

Commissioner of Income-Tax v M/S Sun Engineering Works (P) (1992) 198 ITR 297, SC (refd)

Commissioners of Inland Revenue v G Angus & Co, The; The Same v J Lewis And Sons (1889) 23 QBD 579, CA (refd)

Exxon Chemical (M) Sdn Bhd v Ketua Pengarah Dalam Negeri [2006] 1 MLJ 428, CA (refd)

General Electric Co Ltd v Price Commission [1975] ICR 1, CA (refd)

Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers [1991] 1 MLJ 417, SC (refd)

I Investment Ltd v Comptroller-General of Inland Revenue [1975] 2 MLJ 208, FC (refd)

Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses [1982] AC 617, HL (refd)

Kelab Lumba Kuda Perak v Menteri Sumber Manusia, Malaysia & Ors [2005] 5 MLJ 193, CA (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 MLJ 1, FC (refd)

Menara PanGlobal Sdn Bhd v Arokianathan a/l Sivapiragasam [2006] 3 MLJ 493; [2006] 2 CLJ 501, CA (refd)

National Land Finance Co-operative Society Ltd v Director General of Inland Revenue [1994] 1 MLJ 99, SC (refd)

Pahang South Union Omnibus Co Bhd v Minister of Labour And Manpower & Anor [1981] 2 MLJ 199, FC (refd)

Pearlman v Keepers and Governors of Harrow School [1979] QB 56, CA (refd)

Petroliam Nasional Bhd v Nik Ramli Nik Hassan [2004] 2 MLJ 288, FC (refd)

Preston v Inland Revenue Commissioners [1985] 2 All ER 327, HL (refd)

Queen, The v St John Shipbuilding & Dry Dock Co Ltd [1981] 1 FC 334, CA (distd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1, FC (refd)

Rekapacific Bhd v Securities Commission & Anor and other appeals [2005] 2 MLJ 269, CA (refd)

Legislation referred to

Income Tax Act 1967 ss 2, 4A, 39(1)(f), (1)(j), 106(1), 109, 109(2), 109B, 109B(1)(a), (1)(b), (1)(c), (2), 140(5)
Rules of the High Court 1980 O 53

Appeal from: Application for Judicial Review No R1-25–166 of 2008 (High Court, Kuala Lumpur)

Hazlina bt Hussain (Ahmad Khairuddin bin Abdullah with her) for the appellant.
Goh Ka Im (Foong Pui Chi with her) (Shearn Delamore & Co) for the respondents.

Abu Samah Nordin JCA:

[1] The issue in this appeal is whether the decision of the Director General of Inland Revenue ('the appellant') in treating the payments made by the first respondent to the second respondent, in consideration of certain services provided by the latter, as royalty and thus subject to payment of withholding tax under ss 109 and/or 109B of the Income Tax Act 1967 ('the ITA') is liable to be quashed by way of judicial review on the grounds that he had acted in excess of his powers under the ITA and/or without jurisdiction and/or unreasonably in the circumstances of the case.

[2] The appellant did not object to the respondents' application in the High Court to challenge his decision by way of judicial review instead of appealing to the Special Commissioners of Income Tax against his decision in treating the said payments as royalty.

[3] The facts are not in dispute. The second respondent is a non-resident. It operates a global network for voice, data and video communication. By a service agreement dated 1 January 2003, the second respondent agreed to allow the first respondent to have connection to its data traffic and to access the global services provided by the second respondent subject to payments at a fixed rate. Payments were made to the second respondent for services provided by the latter. But the first respondent did not make any provision for withholding tax under s 109 of the ITA. The first respondent was of the view that s 109 was not applicable as the said payments were for services performed from outside Malaysia and that all the servers for the network were located outside Malaysia.

[4] The appellant only discovered that no withholding tax was paid by the first respondent in respect of the payments made to the second respondent, after it conducted a withholding tax audit at the first respondent's business premises. Pursuant to the said auditing the appellant by letter dated 31 October 2007 informed the first respondent that it had omitted to pay withholding tax

in respect of payments made to a non-resident for the years of assessment 2001–2005 totalling RM4,891,747 and demanded that payment for that amount be made, failing which no deduction would be allowed under s 39(1)(f) and (j) of the ITA and that the appellant would commence an action under s 106(1) of the ITA to recover tax due and payable from the first respondent. After several meetings and exchanges of correspondence between the appellant and PricewaterhouseCoopers (the first respondent's tax agent) the amount of withholding tax was reduced to RM1,781,274. After further representation by the respondent's tax agent, the appellant by letter dated 14 April 2008 finally reduced the amount of withholding tax to RM1,507,674.80.

[5] The appellant treated the payments made by the first respondent to the second respondent in consideration of services rendered by the latter as royalty and subject to payment of withholding tax under ss 109 and/or 109B of the ITA. The payments for services which the appellant considered as royalty and subject to withholding tax are particularised in Appendix 1 of the appellant's letter, which we reproduce below for convenience:

Lampiran I

(i) Perbelanjaan SAP License and Maintenance Fees.

Bil	Tahun Kewangan Berakhir/ Tahun Taksiran	Belanja Yang Dituntut (RM)	Cukai Pegangan Yang Sepatutnya Dibayar (RM)	Kenaikan Cukai Pegangan (RM)	Catatan
1.	31.12.05/TT 2005	42,960	4,296.00	4,296.00	Seksyen 109, ACP 1967
2.	31.12.05/TT 2005	83,020	8,302.00	8,302.00	Seksyen 109, ACP 1967
	Jumlah	125,980	12,598.00	12,598.00	

(ii) Perbelanjaan Utilities – Leased Communication Facilities.

Bil	Tahun Kewangan Berakhir/ Tahun Taksiran	Belanja Yang Dituntut (RM)	Cukai Pegangan Yang Sepatutnya Dibayar (RM)	Kenaikan Cukai Pegangan (RM)	Catatan
4.	31.12.05/TT 2005	1,524,844	116,334.95	116,334.95	Seksyen 109 dan/atau 109B, ACP 1967

5.	31.12.05/TT 2004	1,426.444	108,827.72	108,827.72	Seksyen 109 dan/atau 109B, ACP 1967
6.	31.12.05/TT 2003	1,634,004	124,663.09	124,663.09	Seksyen 109 dan/atau 109B, ACP 1967
7.	31.12.05/TT 2002	1,721,736	131,356.43	131,35.43	Seksyen 109 dan/atau 109B, ACP 1967
8.	31.12.01/TT 2001	1.562,670	119,220.81	119,220.81	Seksyen 109 dan/atau 109B, ACP 1967
	Jumlah	7,869,698	600,403.00	600,403.00	

(iii) Bayaran Pelbagai kepada Pegawai Latihan, Pekerja Luar Malaysia dan sebagainya.

Bil	Tahun Kewangan Berakhir/ Tahun Taksiran	Belanja Yang Dituntut (RM)	Cukai Pegangan Yang Sepatutnya Dibayar (RM)	Kenaikan Cukai Pegangan (RM)	Catatan
9.	20.04.05/TT 2005	44,596	1,459.60	4,459.60	Seksyen 109 ACP 1967
10.	20.04.05/TT 2005	14,446	1,444.60	1,444.60	Seksyen 109 ACP 1967
11.	07.04.05/TT 2005	236,949	23,694.90	23,694.90	Seksyen 109 ACP 1967
19.	22.12.05/TT 2005	1,000,497	100,049.70	100,049.70	Seksyen 109 ACP 1967
20.	29.11.05/TT 2005	111,876	11,187.60	11,187.60	Seksyen 109 ACP 1967
	Jumlah	1,408,364	140,836,40	140,836.40	

[6] Learned counsel for the appellant explained that the amount of RM1,507,674.80 was arrived at as follows:

(i) Perbelanjaan SAP License and Maintenance Fees

(a) Withholding tax - RM 12,598
(b) Increased With holding tax - RM 12,598

Total RM 25,196

(ii) Perbelanjaan Utilities – Leased Communication Facilities.

(a) Withholding tax -	RM 600,403
(b) Increased With holding tax -	RM 600,403
Total	RM1,200,806

(iii) Bayaran Pelbagai kepada Pegawai Latihan, Pekerja Luar Malaysia dan sebagainya

(a) Withholding tax -	RM 140,836.40
(b) Increased With holding tax -	RM 140,836.40
Total	RM 281,672.80

Total amount: (i) + (ii) + (iii) = RM1,507,674.80.

The increased withholding tax was payable under either ss 109(2) or 109B(2) of the ITA.

[7] The first respondent maintained its view that the above said payments were not royalty and not subject to withholding tax as they were payments made to a non-resident for services wholly performed outside Malaysia. Thus, by letter dated 11 April 2008, the first respondent sought clarification from the appellant as to which withholding tax provisions under the ITA apply to the specific payments as listed in Appendix 1. The appellant in his reply letter dated 14 April 2008 did not however state which particular provisions of the ITA apply to payments made by the first respondent but insisted that the first respondent pay the withholding tax. The first respondent reluctantly paid the withholding tax under protest and challenged the decision of the appellant by way of judicial review.

[8] In its joint application with the second respondent for judicial review under O 53 of the Rules of the High Court 1980 they sought the following reliefs:

(a) an order of certiorari to quash the appellant's decision, contained in the appellant's letter dated 14 April 2008 ('the decision') that the payments made by the first respondent to the second respondent in the years of assessment 2001–2005, for services provided by the second respondent to the first respondent relating to the provision of a global network for voice, data and video communication referred to under the sub-heading 'Perbelanjaan Utilities – Leased Communication Facilities' in the appellant's letter, are subject to withholding tax under ss 4A and 109B and/or 109 of the Income Tax Act 1967 ('the ITA') and are further subject to increased withholding tax under ss 109(2) and/or 109B(2) of the ITA;

(b) a declaration that the appellant's decision is erroneous in law and that the payments are not subject to withholding tax or increased withholding tax under ss 4A and 109B of the ITA and/or 109 of the ITA;

(c) a declaration that, in the event the first respondent is liable to payment of an increased withholding tax under ss 109(2) and/or 109B(2) of the ITA, which the respondents deny, the appellant's basis of computing such an increase is excessive and erroneous;

(d) an order of prohibition to prohibit the appellant from taking any further proceedings arising from the appellant's decision or any similar decision or finding of the appellant in regard to payments by the first respondent to the second respondent;

(e) an order of mandamus to compel the appellant to refund to the first respondent the withholding tax and increased withholding tax in the sum of RM1,200,806 which were withheld and remitted under protest to the appellant on 28 April 2008, and any and all overpayments of withholding tax, debts, increases or tax arising from the grant of any relief by this honourable court; and

(f) costs.

[9] The grounds upon which the above reliefs are sought are stated in the first respondent's affidavit affirmed on 23 May 2008. Briefly, the first respondent alleged that the appellant had acted in excess of and/or without jurisdiction or unreasonably in that he:

(a) failed to exercise his statutory power fairly and in accordance with the rules of natural justice;

(b) failed to take into account relevant considerations;

(c) took into account irrelevant considerations;

(d) acted in excess of the jurisdiction and/or powers under the ITA;

(e) had abused and/or misused and/or failed to use his discretion; and

(f) failed to give any basis or reasons as to why the payment for the services were subject to withholding tax.

[10] The High Court allowed the respondents' application for judicial review and further held that the payments for the services were not royalty and therefore not subject to withholding tax for the following reasons:

> (18) The respondent avers that the respondent had explained to the applicant vide the letters exhs PC-5, PC-7 and PC-9 that there was non-compliance with regard to withholding tax for the payments made as royalties. A perusal of the three letters referred to shows that both ss 109 and 109B of the ITA were mentioned. I agree

with counsel for the applicants that ss 109 and 109B refers to two different scenarios where withholding tax is imposed. The documents produced show that the first time that the respondent informed the applicants that the payments were royalties and were therefore subject to withholding tax was vide the respondent's affidavit-in-reply encl 14. In my opinion there was failure on the part of the respondent to give due consideration to relevant matters at the material time when making the decision that the payments were royalties and subject to withholding tax. Public interest demands that a statutory power must be exercised reasonably and with due consideration. I agree with counsel for the applicants that in the circumstances of this case it was unreasonable of the respondent to apply both ss 109 and 109B. I find that applying both ss 109 and 109B renders the respondent's decision unreasonable.

(19) The respondent relied on article 2 of the unsigned draft agreement exh AP-2 to support the contention that the payments were subject to withholding tax by virtue of being royalty payments. However as submitted by counsel for the applicants and with whom I agree, the respondent had relied on an incorrect basis of fact since exh AP-2 is an unsigned agreement and relates to other years of assessment. Hence the respondent's decision is fundamentally flawed.

(20) In the *Queen v St John Shipbuilding & Dry Dock Co Ltd* [1981] 1 FC 334 cited by counsel for the applicants, the Federal Court of Appeal of Canada held:

> 'Royalties', though a broad term, when used in the sense of a payment for the use of property, connotes a payment calculated by reference to the use or to the production or revenue or profits from the use of the rights granted. In Jowitt's *Dictionary of English Law* the term is defined thus:
>
> > Royalty, a payment reserved by the grantor of a patent, lease of a mine or similar right, and payable proportionately to the use made of the right by the grantee. It is usually a payment of money, but may be a payment in kind, that is, of part of the produce of the exercise of the right. See RENT.
> >
> > Royalty also sometimes means a payment which is made to an author or composer by an assignee or licensee in respect of each copy of his work which is sold, or to an inventor in respect of each article sold under the patent.

(21) In the present case there is no evidence to show that the service agreement was entered into by the applicants with the intention of allowing the use of software by the first applicant to produce profits. A perusal of the agreement shows that it is an agreement by which the second applicant agreed to provide services to the first applicant to facilitate access to the global network for voice, data and video communication to enable the first applicant to connect to the worldwide telecommunication network. There is no evidence that the payments were made for the grant of rights by the second applicant to the first applicant to develop commercially or exploit the software. On the contrary the service agreement shows that any payment for software was necessary for the acquisition of the second applicant's services required by the first applicant for the first applicant's business. In the applicant's affidavit-in-reply affirmed by Darren Matthew Ridge it averred, inter alia, as follows (para 14 encl 15):

> The Second Applicant being a mere remote telecommunication service provider

never developed or exploited any rights to use of any kind and payments made by the First Applicant to the Second Applicant in years of assessment 2001 to 2005 were specifically only for the Services provided by the Second Applicant to the First Applicant.

Hence I agree with the applicants that the respondent erred in its conclusion that the payments were royalties. The respondent had failed to read the service agreements as a whole. In my opinion the decision of the respondent that the payments were subject to withholding tax on the ground that the payments were royalties is a decision that no reasonable decision-maker similarly circumstance would have come to. For the reasons stated I allowed the application with costs of RM4,000 to the applicants.

(The respondent referred to in the High Court is the appellant before us while the applicants in the High Court are the respondents before us).

[11] This is the appellant's appeal against the decision of the High Court. The appeal is based on two grounds. Firstly, whether the appellant had acted unreasonably in failing to give reasons why the payments were subject to withholding tax. Secondly, whether the payments were in fact and in law, royalty or for services rendered by the second respondent.

FIRST GROUND

[12] Learned counsel for the appellant submitted that this was not a case under s 140(5) of the ITA where the appellant had to give reasons for his decision. Be that as it may, the appellant had in fact given reasons why the payments were subject to withholding tax at the several meetings between the appellant and the tax agent for the first respondent. The first respondent was given ample opportunity to put its case at those meetings held after the appellant conducted the audit at the first respondent's premises and before the appellant finally reduced the amount of withholding tax to RM1,507,674.80. On 25 July 2008 the appellant again informed the first respondent's tax agent why the payments were treated as royalty and subject to withholding tax.

[13] In our view s 140(5) of the ITA is not applicable to the facts before us. There are ample authorities that where a public decision maker fails to provide reasons, the courts are at liberty to conclude that he has no good reasons in making his decision. Abdoolcader J (as the then was) in delivering the decision of the Federal Court in *Pahang South Union Omnibus Co Bhd v Minister of Labour And Manpower & Anor* [1981] 2 MLJ 199 at p 202, had endorsed what Lord Denning MR in *General Electric Co Ltd v Price Commission* [1975] ICR 1, at p 12 said on the duty expected of the decision maker:

... The courts will ensure that the body acts in accordance with the law. If a question arises on the interpretation of words, the courts will decide it by declaring what is the correct interpretation: see *Punton v Ministry of Pensions and National Insurance*

A [1963] 1 WLR 186. And if the decision – making body has gone wrong in its interpretation, they can set its order aside: see *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 1 WLR 1320 .... If the decision-making body is influenced by considerations which ought not to influence it; or fails to take into account matters which it ought to take into account, the court will interfere: see *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, at pp 1007 and 1061. If the decision-making body comes to its decision on no evidence or comes to an unreasonable finding – so unreasonable that a reasonable person would not have come to it – then again the courts will interfere: see *Associated Provincial Picture House Ltd v Wednesbury Corporation 1* [48] 1 KB 233. If the decision-making body goes outside its powers, or misconstrues the extent of its power, then, too, the courts can interfere: see *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147. And, of course, if the body acts in bad faith or for an ulterior object, which is not authorised by law, its decision will be set aside: see *Sydney Municipal Council v Campbell* [1925] AC 338. In exercising these powers, the courts will take into account any reasons which the body may give for its decision. If it gives no reasons – in a case when it may reasonably be expected to do so, the courts may infer that it has no good reason for reaching its conclusion and act accordingly. See *Padfield*'s case [1968] AC 997 at pp 1007 and 1061.

See also *Rekapacific Bhd v Securities Commission & Anor and other appeals* [2005] 2 MLJ 269, *Kelab Lumba Kuda Perak v Menteri Sumber Manusia, Malaysia & Ors* [2005] 5 MLJ 193 and *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1 generally on the need to give reasons by public bodies or authorities in making their decisions.

F SECOND GROUND

[14] Learned counsel for the appellant submitted that the payments fall within the definition of 'royalty' in s 2 of the ITA. 'Royalty' as defined in the ITA includes:

G (a) any sums paid as consideration for the use of, or the right to use:

(i) copyrights, artistic or scientific works, patents, designs or models, plans, secret processes or formulate, trademarks or H tapes for radio or television broadcasting, motion picture films, films or video tapes or other means of reproduction where such films or tapes have been or are to be used or reproduced in Malaysia or other like property or rights;

I (ii) know-how or information concerning technical, industrial, commercial or scientific knowledge, experience or skill;

(b) ...

As the first respondent was given the right to use the software under the service agreement and was not allowed to copy or modify the software without the authorisation of the second respondent, the payments made for the right to use the software fall within the definition of royalty under s 2 of the ITA and subject to withholding tax.

[15] Learned counsel relied, among others, on *Commissioner of Income-Tax v Davy Ashmore India Ltd* (1991) 190 ITR 626 Cal, *Commissioner of Income-Tax v M/S Sun Engineering Works (P)* (1992) 198 ITR 297 and *I Investment Ltd v Comptroller-General of Inland Revenue* [1975] 2 MLJ 208 in support of her submission that the payments made by the first respondent to the second respondent were in the nature of royalty. It was submitted that the cases cited by learned counsel for the respondents including *Bharat Sanchar Nigam Ltd & Anr v Union of India & Ors* (2006) 3 SCC 1 and *The Queen v St John Shipbuilding & Dry Dock Co Ltd* [1981] 1 FC 334 were distinguishable and not relevant to the case in the instant appeal.

[16] The respondents' application for judicial review is confined to payments for services relating to leased communication facilities totalling RM1,200,806. They said that it was wrong for the appellant to treat the payments as royalty and subject to withholding tax when such payments were paid to a non-resident for services performed outside Malaysia.

[17] The respondents claimed that the first time the appellant disclosed to them that the payments were treated as royalty was in their affidavit-in-reply affirmed on 15 June 2009 after the respondents had filed their application for judicial review. Prior to that the word 'royalty' was never stated anywhere in any of the appellant's letters asking the first respondent to pay withholding tax. The appellant's letter dated 25 July 2005 was written after the filing of the application for judicial review.

[18] The heading of the appellant's letter dated 14 April 2008 merely refers to ss 109/109B of the ITA. In Appendix 1 of the said letter, under the heading 'leased communication facilities', the appellant again referred to 'ss 109 and/or 109B of the ITA'. It was submitted that the appellant relied on both sections as he was unsure and could not make up his mind which particular section of the ITA apply to the payments made by the first respondent to the second respondent. Sections 109 and 109B of the ITA are distinctly different and each section deals with different subject matter. Section 109 of the ITA speaks of liability to pay withholding tax in respect of interest or royalty whereas s 109B(1)(a) speaks of liability of resident tax payer to pay withholding tax to a non-resident for services rendered by the non-resident in connection with the use to property or his rights belonging to, or the installation or operation of any plant, machinery or other apparatus purchased from such non-resident.

A Section 109B(1)(b) and (c) of the ITA are not relevant to the instant appeal.

[19] Learned counsel for both sides had submitted at length as to whether the payments made by the first respondent to the second respondent were in fact and in law, royalty.

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[20] It is however apposite to remind us that what is before us is an appeal arising from the respondents' application for judicial review, among others, to quash the appellant's decision in treating the said payments as royalty and therefore subject to payment of withholding tax.

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[21] There is a clear distinction between judicial review and appeal. Appeal is concerned with the merits of the case, in the sense that the appellate court can substitute its own opinion for that of the decision maker. Appeals lie on fact and law. Such rights of appeal are statutory and the courts possess no inherent appellate jurisdiction. Review, by contrast, is not concerned with the merits of the decision but with the validity of the decision-making process: see *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417, *Menara PanGlobal Sdn Bhd v Arokianathan a/l Sivapiragasam* [2006] 3 MLJ 493; [2006] 2 CLJ 501 and *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141. The Federal Court in *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288 had clarified that the decision in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 that the court could substitute its own view to that of the Industrial Court should only be exercised in the most appropriate of cases. The same view was expressed in a subsequent decision of the Federal Court in *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1.

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[22] In *Inland Revenue Commissioners v National Federation of Self Employed and Small Businesses* [1982] AC 617, Lord Wilberforce at p 632 of His Lordship's judgment said that the Inland Revenue was not immune from the process of judicial review; that a taxpayer would not be excluded from seeking judicial review if he could show that the revenue had either failed in its statutory duty toward him or had been guilty of some action which was an abuse of their powers or outside their power altogether.

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[23] In *Preston v Inland Revenue Commissioners* [1985] 2 All ER 327 the House of Lords once again held that the court could grant judicial review of the decision of the Inland Revenue Commissioners at the instance of a taxpayer if the commissioners failed to discharge their statutory duty to the taxpayer or if they abused or exceeded their powers. For the purposes of judicial view abuse of power included the unfair exercise of a statutory power if the commissioners' decision or action was equivalent to a breach of contract or a breach of representation giving rise to an estoppel. Lord Templeton at p 337 said:

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Judicial review is available where a decision-making authority exceeds its powers, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached or abuses its powers.

[24] We have considered the submissions by both sides and scrutinised the judgment of the learned judge. We dismissed the appeal with costs at the end of the hearing. We agreed with the decision of the learned judge and the grounds given by the learned judge in holding that in the circumstances of the case the appellant had acted unreasonably by invoking both ss 109 and 109B of the ITA in deciding that the payments were royalty within the meaning of s 2 of the ITA and that the appellant had taken into consideration irrelevant matters by relying on the unsigned draft agreement (exh AP2) in arriving at his decision.

[25] Learned counsel for the appellant had unequivocally contended, in support of the appellant's affidavit-in reply, that the payments were in fact and in law, royalty and chargeable as withholding tax under s 109 of the ITA. That was an implied admission that the payment were not chargeable under s 109B of the ITA. In our judgment the appellant had not only acted unreasonably in the circumstances of the case but had committed an error of law and exceeded his statutory power by relying on both sections of the ITA.

[26] In *Pearlman v Keepers and Governors of Harrow School* [1979] QB 56, Lord Denning said that 'no court or tribunal has any jurisdiction to make an error of law on which the decision in the case depends. If it makes such an error, it goes outside jurisdiction and certiorari will lie to correct it'. The appellant's letter dated 14 April 2008 and Appendix 1 to that letter clearly showed that the appellant relied on s 109 as well as s 109B of the ITA. As we have said earlier these sections are distinctly different and each section deals with different subject matter. The appellant was indeed indecisive and could not make up his mind as to which particular section of the ITA apply in respect of payments for the 'leased communication facilities'. So, he invoked both sections. The appellant's affidavit-in-reply state that the payments were in the nature of royalty. Learned counsel for appellant before us also said the payments were royalty. But En Norhisham who appeared for the appellant in the High Court said that the payments were partly for royalty and partly for services. So, both sections apply. This was a clear cut case in which the appellant had made a decision arbitrarily in exercise of his statutory power to the detriment of the first respondent.

[27] Any doubt as to the applicable provision of the taxing statute must be held in favour of the taxpayer. In *The Commissioners of Inland Revenue v G Angus & Co The Same v J Lewis And Sons* (1889) 23 QBD 579 Lord Esher said:

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> Now, the first thing to be observed is that when the legislature assume to impose a tax on the subject, they must do so in clear and distinct terms; if the matter remains in doubt, the subject is entitled to judgment ....

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[28] We need only recite two local authorities in support of the proposition that where doubt exists, the court should rule in favour of the taxpayer. In *National Land Finance Co-operative Society Ltd v Director General of Inland Revenue* [1994] 1 MLJ 99 the Supreme Court (as it then was) explained:

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> There are ample authorities to show that courts have refused to adopt a construction of a taxing Act which would impose liability when doubt exists. In *Re Micklewait* (1855) 11 Exch 452 it was held that a subject was not to be taxed without clear words. We realise that revenue from taxation is essential to enable the government to administer the country and that the courts should help in the collection of taxes whilst remaining fair to taxpayers. Nevertheless, we should remind ourselves of the principle of strict interpretation as stated by Rowlatt J in *Cape Brandy Syndicate v IRC*:

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> > ... in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used ...

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> ... it has also been said by the judicial committee in *Oriental Bank Corporation v Wright* (1880) 5 AC 845 at p 856 'that the intention to impose a charge upon a subject must be shown by clear and unambiguous language'.

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[29] In *Exxon Chemical (M) Sdn Bhd v Ketua Pengarah Dalam Negeri* [2006] 1 MLJ 428 the Court of Appeal said:

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> ... the principle that a provision in a taxing statute must be read strictly is one that is to be applied against revenue and not in its favour. The maxim in revenue law is this: no clear provision; no tax. If there is any doubt then it must be resolved in the taxpayer's favour ... The corollary of that proposition is that those parts in a revenue statute that favour the taxpayer must be read liberally.

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[30] There was a clear admission in the appellant's affidavit affirmed on 26 March 2010 that the appellant's decision was also based on the 'Customer Services Contract' (exh AP2). Paragraph 4 of the affidavit said:

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> 4. Selanjutnya saya menyatakan bahawa keputusan pihak Respondent adalah berdasarkan perjanjian 'Customer Services Contract' antara Alcanet International Asia Pacific Pte Ltd dan Alcatel Network System (Malaysia) Sdn Bhd. Sesalinan perjanjian tersebut dilampirkan dan ditandakan sebagai eksibit 'AP-2'.

With respect, the 'Customer Services Contract' was an unsigned draft agreement for services provided by the second respondent for the years prior to 2001–2005. It is irrelevant and cannot form the basis of the appellant's

decision. A decision of an inferior tribunal which took into consideration irrelevant matters or disregarded relevant matters is amenable to judicial review and liable to be set aside: *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1.

[31] For the abovesaid reasons, we dismissed the appeal by the appellant with costs. In view of our decision above it was not necessary to decide on the merits whether the payments made by the first respondent to the second respondent were in law royalty within the meaning of s 2 of the ITA.

Appeal dismissed with costs.

Reported by Kohila Nesan